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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 864

JOHN F. MORGAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 2a) is reported at 121 F. Supp. 941. The opinion of the Court of Appeals (R. 28a-33a, Pet. App. 15-20) is reported at 229 F. 2d 291.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 21) was entered on January 17, 1956. The petition for a writ of certiorari was filed on April 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

After this Court's decision in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783, holding that the United States, as owner of a vessel, rather than its general agent, is liable for the negligence of the master and crew, the period of limitations for a suit against the United States was enlarged, provided, however, that such suit was "based upon a cause of action whereon a prior suit * * * was timely commenced [against a general agent] and was * * * dismissed solely because improperly brought against" the wrong party defendant (46 U.S.C. 745). Petitioner's prior state court suit against a general agent was dismissed because he failed to appear when the case was called for trial. The state court has authority, under certain conditions and in its discretion, to relieve a party from a default judgment, but petitioner did not seek such relief.

The question presented is whether, in the circumstances of this case, petitioner's prior suit was "dismissed solely because improperly brought against" the wrong party defendant.

STATUTES INVOLVED

The pertinent statutory provisions and rules are set forth in the Appendix, *infra,* pp. 17-21.

STATEMENT

Petitioner injured his left ankle on January 19, 1944, while employed by Van Hoesen & Brother as a watchman on board the *S.S. Green Mountain State* (R. 7a-8a, 22a). The accident allegedly resulted from the negligence of the crew (R. 22a). The vessel was owned by the United States and was being operated by States Marine Corporation as General Agent (R. 7a). On April 20, 1944, three months after his accident, petitioner instituted suit against the general agent in the New York Supreme Court, New York County, to recover damages (R. 8a). Issue was joined and the cause was placed on the calendar (*ibid.*).

The cause was advanced to the Ready Calendar in March, 1949, and thereafter was passed from day to day awaiting a trial part (*ibid*).[1] On March 25, 1949, the Clerk of the Trial Term, Part II, notified defendant's counsel that the case would be assigned for trial on March 28, 1949 (*ibid.*).[2]

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[1] As to the calendar practice, see fn. 8, *infra*, pp. 13-14.

[2] The calendar clerk telephones counsel when his case is about to be assigned for trial. Rule III, subd. 3, New York County Supreme Court Rules, *infra*, pp. 19-20 (see *Cahill-Parsons New York Civil Practice*, 2d Ed., p. U-58). Petitioner's counsel does not suggest that he did not receive this notification.

On March 28th, the defendant appeared for trial. A trial part was available, but neither the petitioner nor his attorney appeared. Thereupon, the court on its own motion dismissed the action against the general agent because of the failure of the petitioner or his attorney to be present (R. 8a-9a, 12a). At no time thereafter did petitioner take any step to vacate or disturb that dismissal.

In June of that year, this Court rendered its decision in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783, holding that a general agent employed by the United States to manage certain phases of the ship's business is not liable for injuries sustained through the negligence of the ship's master and crew. Prior to that decision, it had appeared that a seaman's remedies were available either against the general agent or against the United States.[3] *Cosmopolitan Shipping Co.* made it clear that the remedies are available only against the United States. A number of litigants who had previously brought suit against the general agents accordingly found that they had sued the wrong party and that, in the meantime, the two year period of limitations[4] applicable to a suit against the United States had expired. To afford these litigants an opportunity to have their claims heard, Congress on December 13, 1950,

[3] Cf. *Hust* v. *Moore-McCormack Lines,* 328 U.S. 707, expressly overruled in *Cosmopolitan Shipping Co., supra.*

[4] 46 U.S.C. (1946 Ed.) 745.

some eighteen months after the *Cosmopolitan Shipping Co.* decision, amended the statute of limitations so as to give such litigants an additional year within which to bring suit against the United States. 64 Stat. 1112, now 46 U.S.C. 745 (*infra*, p. 17).

The amendment, however, permitted suit against the United States only if the suit was founded upon a cause of action "whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States." *Ibid.*

Relying on the amendment, petitioner brought the instant action against the United States by filing a libel in the United States District Court for the Southern District of New York on May 2, 1951 (R. 20a). Subsequently, on motion by the United States (R. 6a *et seq.*), the District Court dismissed the libel as untimely, holding that the 1950 amendment to 46 U.S.C. 745 was not applicable because petitioner's earlier "suit in the state court was not dismissed *solely* because improperly brought against the general agent," as required by the amendment (R. 2a; emphasis in original).

On appeal, the Second Circuit affirmed, one judge dissenting. The opinion (R. 28a-33a, Pet.

App. 15-20) observes that petitioner failed to convince the district court that his sole reason for suffering dismissal of the prior suit was the statutory ground; that, in permitting the dismissal, petitioner could not have been motivated by the decision in the *Cosmopolitan Shipping Co.* case since that case was not decided until three months later; that, even if petitioner could have reinstated his prior case on the calendar and then caused it to be dismissed, the fact is that he did not do so and that he offered no explanation, either by affidavit or otherwise, for permitting dismissal or for failing to reinstate; that, in the absence of any offer of proof as to his reasons for failing to reinstate, there is no basis for concluding that the sole reason was the statutory one; and that the crucial issue is not what petitioner could have done, but whether in fact his sole reason for permitting the dismissal to become final was the statutory one. The dissent states that the majority opinion holds petitioner's action untimely because he did not follow "an empty ceremony (*i.e.*, reinstating the state-court suit and then having it dismissed)", and that this exalts the literal meaning of the amendatory statute at the expense of its purpose to help seamen.

ARGUMENT

1. The 1950 amendment of the Suits in Admiralty Act lifted the bar of the statute of limitations for a brief period to permit suit against the

United States by those claimants who had previously brought a timely action against the general agent but whose prior action had been dismissed "solely because improperly brought" against the wrong party defendant (46 U.S.C. 745, *infra*, p. 17; see S. Rept. No. 1782, 81st Cong., 2d Sess.). The single question here is whether, in the particular circumstances of this case, petitioner's prior action in the Supreme Court of New York was dismissed "solely because improperly brought" against the general agent. Both the district court and the court below found, on the basis of the affidavits and evidence presented, that petitioner had failed to establish that his prior action was dismissed for that reason. He failed, in other words, to meet the explicit and fundamental requirement of the statute. Whether or not that requirement was met is essentially an issue of fact and it is primarily a review of an adverse factual determination which petitioner seeks in this Court. Petitioner does not claim a conflict on the question presented, nor does he show that the question is of any current or general importance. He does not point to any other claimants similarly situated, nor does he point to any other pending case involving a like question. Moreover, it is evident that the question is not likely to recur. This follows from the fact that the amendment lifted the bar of limitations only for a period of one year, ending December 13, 1951 (*infra*, p. 17).

It has no application to any suit filed since that date.

2. Apart from the fact that the challenged decision appears to have no significance beyond the instant case, we believe that the result reached below is correct.

a. The 1950 amendment of 46 U.S.C. 745 was not a blanket extension of the statute of limitations or a revival of rights for all claimants. Both its language and its legislative history demonstrate a Congressional purpose to lift the bar of limitations for a very narrow class of litigants, namely, those whose prior suit against the general agent "was timely commenced and was or may hereafter be dismissed *solely* because improperly brought against" the wrong person (46 U.S.C. 745; emphasis supplied).[5] The test imposed by

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[5] This restricted purpose is emphasized by the committee reports accompanying the bill. "The cases to be affected are those where timely suits against Government agents have been dismissed solely because improperly brought against the agent. • • • It is important to note that the bill in itself is designed to provide relief only in those cases where suits were dismissed, though timely brought, solely because brought against an improper party, and where the time for suits against the United States under existing law had expired. • • • [F]igures are not available as to the number of claimants who would benefit by the bill, although the number is considered to be relatively few." S. Rept. No. 1782, 81st Cong., 2d Sess., pp. 1, 3. See also S. Rept. No. 2535, 81st Cong., 2d Sess., p. 3; H. Rept. No. 2060, 80th Cong., 2d Sess., pp. 2, 3; H. Rept. No. 1292, 81st Cong., 1st Sess. And see 95 Cong. Rec. 12098. These reports demonstrate that there is

the statute is not whether the claimant had a prior suit against a general agent which *somehow* resulted in a dismissal; the test is whether such dismissal resulted *solely* from suing the wrong party. Petitioner does not meet that test. While he sued the general agent in the belief that it was a proper party defendant, the inescapable fact is that the dismissal was not based on the ground that he had sued the wrong party defendant. The dismissal was for an independent reason, one which would have caused dismissal even if the right party defendant had been before the court, *viz.,* that petitioner and his counsel failed to appear when the case was called for trial.

The word "solely" was employed in the statute "to limit the effective ground of dismissal as to the general agent to a dismissal because it was an improper party as distinguished from a dismissal as to it for any other reason as, for instance, one on the merits." *Cohen* v. *United States,* 195 F. 2d 1019, 1021 (C.A. 2). Not only does a dismissal on the merits fail to meet the statutory requirement (*Weilbacher* v. *J. H. Winchester & Co.,* 197 F. 2d 303 (C.A. 2)); a dismissal based upon lack of prosecution similarly fails. *Kalil* v. *United States,* 107 F. Supp. 966 (E.D. N.Y.); *Slemp* v. *United States,* 112 F. Supp. 351 (S.D. N.Y.); *Jett* v. *United States,* 1953 A.M.C. 233 (S.D.

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no divergence whatever between the purpose of the legislation and the literal meaning of the language employed in the statute.

N.Y.). A dismissal based upon a plaintiff's failure to appear when the case is called for trial is substantially the equivalent of a dismissal for lack of prosecution (cf. Rule 302, N.Y. Rules of Civil Practice, *infra*, p. 18).[6] But even if it were otherwise, the significant point is that such a dismissal is not a dismissal based upon lack of the proper party defendant. The 1950 amendment was aimed at helping those who were out of court solely because they had sued the wrong party. "There is a manifest difference between a suitor who has mistaken his remedy and one who has persisted in refusing to pursue the remedy which he has chosen to seek" (*Kalil, supra,* at p. 967).

The 1950 statute was, of course, a remedial one and as such is entitled to a liberal construction. *Cohen* v. *United States, supra.* It is for that reason that the courts will look beyond the record of the prior case, if that record is silent or ambiguous

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[6] The cases to the contrary, relied on by petitioner (Pet. 10 at fn. 9), were decided prior to October 15, 1942, the date Rule 302, N.Y. Rules of Civil Practice, was adopted. That Rule specifies that a cause marked off the calendar and not restored within a year thereafter shall be "dismissed * * * for failure to prosecute * * *." A case marked off the Trial Term Calendar of the New York County Supreme Court and not restored within a year must be dismissed pursuant to Rule 302, *supra.* Rule III, subd. 6, New York County Supreme Court Trial Term Rules, *infra*, p. 21. Petitioner's quotation of Rule III, subd. 6 (Pet. 7 at fn. 6), is incomplete since it omits the following words which should appear before the period: "pursuant to Rule 302 of the Rules of Civil Practice." But see fn. 8, *infra*, pp. 13-14.

or does not reflect the true reason for dismissal, to determine whether the statutory requirement is met. Thus, in *Cataldo* v. *United States,* 108 F. Supp. 560 (S.D. N.Y.) where the record reason for the prior dismissal was lack of prosecution (resulting from the failure of plaintiff's counsel to oppose dismissal when the case was called on the court's Dismissal Calendar), it was established by affidavit submitted in the suit later brought against the United States that the parties had agreed that the first case should be dismissed or be taken off the calendar in view of this Court's decision in *Cosmopolitan Shipping Co.* (108 F. Supp. at 562). Likewise, in *Parker* v. *United States,* 104 F. Supp. 814 (E.D. N.Y.), the claimant established that he had discontinued his action against the general agent solely on the basis of the *Cosmopolitan Shipping Co.* decision, and the court, viewing the statute liberally, held a discontinuance to be the equivalent of a dismissal. See also, *Merlino* v. *United States,* 104 F. Supp. 817 (S.D. N.Y.) (allowing amendment of the libel so as to permit proof that the prior action was dismissed for the statutory reason).

But, unlike the claimants in *Cataldo* and *Parker,* petitioner failed to show that he permitted his prior action to be dismissed solely because he had sued the wrong party. Obviously, since the *Cosmopolitan Shipping Co.* case was decided three months after the dismissal of the prior

action, that decision could not have motivated petitioner in permitting the action to be dismissed. As the court below stated (Pet. App. 18-19):

> He has offered no explanation for his failure to appear at the calendar call. For aught we know whatever reasons prompted his failure to appear continued during the one year period [following dismissal] and motivated his failure to restore. * * * Clearly, the reason for libelant's failure to appear in March, 1949, could not have been the statutory one; and, absent affidavits or other offers of proof, the natural inference of a continuing motivation, whatever such motivation was, has not been rebutted.[7]

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[7] The petition asserts (Pet. 2, 3, 12) that counsel permitted the dismissal of, and did not seek to restore, the prior case because of his reliance on *Caldarola* v. *Eckert*, 332 U.S. 155, decided in 1947. But this assertion is *dehors* the record. No such explanation is set forth in the affidavits of record. Petitioner made no showing below that he was misled into doing or failing to do anything. There is, therefore, no occasion for the application of principles of equity, nor, in any event, can equity decree contrary to the statute. Moreover, Mr. Jacob Rassner, counsel for petitioner both here and in the Supreme Court of New York (R. 8a-9a), was also counsel for respondent in *Cosmopolitan Shipping Co.* v. *McAllister* (337 U.S. at p. 784). On the face of it, it would hardly appear that counsel who had won the *Cosmopolitan* case in the Court of Appeals and was vigorously urging affirmance in the U. S. Supreme Court had so little confidence in his position that he permitted the dismissal of the instant case because of the opinion in *Caldarola*.

b. Petitioner argues that the decision below turns upon his failure to perform "a vain act" (Pet. 9-11). He argues that after the dismissal of his state court case he could have moved to have that case restored to the calendar, but that this would have been a vain act because, after accomplishing it, he would have had to dismiss the case anyway since his suit had been brought against the wrong party. The dissenting opinion accepts this view and characterizes the procedure as "an empty ceremony." (Pet. App. 20). Both the petitioner and the dissent proceed on the assumption that getting the case restored to the calendar is little more than a formality and is virtually automatic under the New York practice (Pet. 6-7, 19).

But this assumption is not a correct one. Petitioner relies (Pet. 6-7 at fns. 4, 5 and 6) on three provisions relating to New York practice: (i) Rule III of the Trial Term Rules of the New York County Supreme Court, (i) Rule 302 of the Rules of Civil Practice, and (iii) § 108 of the New York Civil Practice Act, *infra*, pp. 18-21). The first two, by their terms, cover the situation in which a case has merely been *marked off the calendar,* and not, as here, the situation in which a case has been *dismissed.*[8]

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[8] Under the New York County Supeme Court Rules (see *Cahill-Parsons New York Civil Practie,* 2d Ed., pp. U-57 *et seq.*), after issue is joined the case is put on a general trial calendar, which usually has one call each year (Rule II, subd

This distinction, ignored by petitioner and apparently overlooked by the dissenting judge below, is an important one. A case marked off the Ready Day Calendar may be restored to the foot of the general calendar simply upon filing a new note of issue (Rule III, subd. 5, *infra*, p. 20); if not restored within a year, the cause is deemed abandoned and must then be dismissed for failure to prosecute (Rule III, subd. 6, *infra*, p. 21; Rule 302, R.C.P., *infra*, p. 18). Thus, a case marked off the calendar remains pending for at least a year even though the plaintiff does nothing further.

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5). As other cases are disposed of, the case works its way up the calendar until it is advanced to a so-called "Reserve Calendar," which is made up each week (Rule III, subd. 1). Cases on the Reserve Calendar, after call, will be marked either "ready", so as to advance to a so-called "Ready Day Calendar," or are postponed to a subsequent Reserve Calendar (Rule III, subd. 2). Cases on the Ready Day Calendar are assigned to a justice for trial (Rule III, subd. 3). If the plaintiff fails to appear at either the general calendar call or the Reserve Calendar call, the case will be dismissed on motion of the defendant; if neither party appears, it will be marked off the calendar and subsequently restored only upon good cause shown on motion. Rule II, subd. 5; Rule III, subd. 2.

But the rule is different as to the Ready Day Calendar. Rule III, subd. 3 (*infra*, pp. 19-20) provides in part: "Causes on the Ready Day Calendar must be ready for trial and if not ready will be marked 'off,' 'dismissed' or 'for inquest,' unless adjourned by the justice holding the calendar part upon good cause shown by affidavit to have arisen after such causes had been placed on the Ready Day Calendar." Petitioner's suit against the general agent was dismissed on the court's own motion, as distinguished from being marked off the calendar, under this latter Rule (R. 9a, 12a).

Where, however, instead of marking the case off the calendar when plaintiff fails to appear for trial, the court dismisses the case, as it may under the Rules, that ends the matter. In that situation—which was petitioner's case—restoration is not available simply upon the filing of a new note of issue. To reinstate his cause in these circumstances, a party must proceed under § 108, N.Y.C.P.A. (*infra,* p. 18), which empowers the court, in the exercise of its discretion, to relieve a party against a default judgment. And § 108 (the third provision cited by petitioner) affords relief only when the judgment was "taken against him through his mistake, inadvertence, surprise or excusable neglect" (*ibid.*). The record in the present case is silent as to whether petitioner's conduct was excusable on any one of these four grounds.

The excuse belatedly advanced in the petition, as distinguished from what appears in the record (see fn. 7, *supra,* p. 12), indicates a deliberate avoidance of the call for trial, without any effort by petitioner to give notice either to the court or to opposing counsel or to explain his conduct. It is thus difficult to see how the excuse now suggested can meet any of the four allowable grounds for relief. Cf. *Colonial Fuel Corp.* v. *Kahn,* 214 App. Div. 83, 211 N.Y.S. 50; *La Vin* v. *La Vin,* 279 App. Div. 873, 110 N.Y.S. 2d 240. But assuming that the New York court *could* have reinstated the cause if petitioner had attempted to present

his excuses to that court, it is, at the least, conjectural whether it would have exercised its discretion in his behalf (cf. *ibid; Orlando* v. *Doyle,* 111 N.Y.S. 2d 735), and, if it did so, what terms or conditions it might have attached. See § 108, *supra; cf. Kemelhor* v. *Kravitz,* 203 Misc. 370, 118 N.Y.S. 2d 587. These problems, which petitioner and the dissenting judge ignore, emphasize the correctness of the decision below that "the crucial issue is not the hypothetical question of what [petitioner] *could* have done, but whether *in fact* his sole reason for suffering final dismissal in March 1950 [when the time to seek relief against the default judgment expired] was the statutory one" (Pet. App. 19; emphasis in original). By his failure, both in state and federal courts, to make any showing, petitioner, himself, has effectively prevented such a factual determination.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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May 1956.

APPENDIX

1. 46 U.S.C. 745, as amended December 13, 1950, 64 Stat. 1112, provides in pertinent part as follows:

> § 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived * * *.
>
> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel * * *.

2. § 108 of the New York Civil Practice Act provides as follows:

> § 108. Relief against default judgments and orders. The court, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, may relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect.

3. Rule 302 of the New York Rules of Civil Practice provides in pertinent part as follows:

> Rule 302. Dismissal of abandoned cases. * * *
>
> 2. In the supreme court and county courts a cause hereafter marked "off" or struck from the trial term or special term calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned, and the complaint and counterclaim, if any, shall be dismissed without costs for failure to prosecute, and the clerk shall make appropriate entry to that effect pursuant to this rule without necessity of further order.

4. New York County Supreme Court Rules as to Trial Terms provide in pertinent part as follows:

Rule III.

Reserve Calendar—Ready Day Calendar. Subd. 1. The calendar clerk shall make up from the causes on the Trial Calendar a Reserve Calendar for each Friday to be called at Trial Term, Part II * * *.

* * * * *

Subdivision 2. After a cause first appears on a Reserve Calendar it shall not be adjourned by stipulation for more than a total period of three months. Excuses or applications for postponement must be made by affidavit on the call of the Reserve Calendar. Causes on the Reserve Calendar must be marked either "ready" so as to advance to a place on the Ready [Day] Calendar or be adjourned to a subsequent Reserve Calendar. If upon the call of the Reserve Calendar the plaintiff fails to appear the complaint will be dismissed on motion of the defendant, and likewise, if the defendant fails to appear and the plaintiff appears, the cause will be marked for inquest and set for such part and time as the justice holding the calendar part shall direct. If upon the call no answer is made by any of the parties the cause will be marked off the calendar and subsequently restored only upon good cause shown on five days' notice of motion. Causes on the Reserve Calendar, if marked "ready," will be added in sequence to the Ready Day Calendar.

Subd. 3. The calendar clerk shall make up daily from the causes marked "ready" on the Reserve Calendar calls, the Ready Day

Calendars * * *. Causes on the Ready Day Calendar must be ready for trial and if not ready will be marked "off," "dismissed" or "for inquest," unless adjourned by the justice holding the calendar part upon good cause shown by affidavit to have arisen after such causes had been placed on the Ready Day Calendar. "Ready" causes will be assigned to the various parts for trial. Thereafter causes will be assigned by the Trial Term calendar clerk, under the direction of the justice holding the calendar part, to the various parts for trial as required. In all causes marked "ready" counsel must keep in touch with their clients and witnesses so that they will be available when needed. Counsel will leave their telephone numbers with the calendar clerk, and such clerk will communicate with the office of counsel as causes are about to be assigned for trial. A notice showing the condition of each trial part will be posted in the office of the calendar clerk. All questions arising with respect to the calendar shall be referred by the calendar clerk to the justice holding the calendar part.

* * * * *

Subd. 5. A cause marked "off calendar" may be restored to the foot of the Trial Calendar upon the filing of a new note of issue. The justice holding the calendar part may, however, for good cause shown, upon five days' notice of motion, order restoration of the cause to a Reserve Calendar or to a Ready Day Calendar for a day certain.

Subd. 6. A cause hereafter marked "Off" the Trial Term Calendar or unanswered on a clerk's calendar call, and not restored within a year thereafter, shall be deemed abandoned, and the complaint and counterclaim, if any, be dismissed without costs, pursuant to Rule 302 of the Rules of Civil Practice.

* * * * *

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